FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 77-6219

THOMAS BALDASAR,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

REPLY BRIEF FOR PETITIONER

MARY ROBINSON
Deputy Defender
Office of the State
Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State
Appellate Defender
First Judicial District
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH RUEBNER
PETER NOLTE

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THE SIXTH AMENDMENT RIGHT TO COUNSEL FORBIDS THE USE OF A FINE-ONLY UNCOUNSELED MISDEMEANOR CONVICTION TO INCREASE PETITIONER'S IMPRISONMENT ON A SUBSEQUENT OFFENSE UNDER AN ENHANCED PENALTY STATUTE.

A. An Uncounseled Misdemeanor Conviction While Valid For The Purpose Of A Fine Is Not Valid For Enhancing Punishment By Two Years In Prison And Two Years Of Parole

The Respondent has completed a full turnabout from the position it announced in *Scott v. Illinois*, ____ U.S. ____, 59 L.Ed.2d 383 (1979), concerning the issue of whether an uncounseled conviction may be used to enhance a prison sentence on a subsequent offense. In *Scott v. Illinois*, the Respondent declared that a prosecutor would be precluded from using an uncounseled conviction to enhance a subsequent offense:

> With respect to the use of an uncounseled conviction as the basis of a probation revocation proceeding or to enhance a subsequent offense, the use of such convictions to incarcerate an individual depends on how direct the first conviction is to imprisonment. Generally such use has been prohibited. Krantz, et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin*, 35-37, 44 (1976) hereinafter cited as Krantz. This result, however, is not inconsistent with state purposes but is legitimately within the realm of prosecutorial discretion. When prosecuting an offense the prosecution knows that by not requesting that counsel be appointed for defendant, he will be precluded from enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion.

Brief of Respondent, at pp. 19-20, *Scott v. Illinois*, 59 L.Ed.2d 383 (1979). Having convinced this Court that counsel is not required where conviction results in a fine only, the Respondent abandons its previous concession to urge the use of uncounseled convictions for enhancement purposes.

The Respondent now argues that since petitioner's 1975 misdemeanor theft conviction was a valid conviction, it was also valid for the purpose of enhancing his subsequent sentence. (Respondent's Brief, pp. 12-13) The Respondent relies on *Griffin v. Blackburn*, 594 F.2d 1144 (5th Cir., 1979), which determined whether petitioner Griffin could be impeached by a prior uncounseled misdemeanor conviction which did not result in imprisonment. Finding that *Scott v. Illinois* had resolved this question, the court concluded that the impeachment was proper because, "[l]ogically, if a conviction is valid for purposes of imposing its own pains and penalties–the 'worst' case–it is valid for all purposes". 594 F.2d at 1046.[1] Such a conclusion overlooks the fact that Scott's counselless conviction was not valid for all purposes, since it authorized only a fine and not a prison sentence. The approach that a conviction valid for one purpose is thus valid for all purposes is also inconsistent with the rule that a defendant may be impeached only by prior convictions which bear directly on testimonial credibility of the witness. (See Fed.R.Evid. 609)

A further analogy can be made concerning the validity of the prior convictions present in *Burgett v.*

[1] The petitioner in *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir., 1979), was proceeding *pro se*. The case was decided on the court's summary calendar without oral argument on May 9, 1979. Apparently, the court was not informed that this Court had previously granted certiorari in this cause on March 19, 1979. The question presented herein may be analagous, but is different since *Griffin v. Blackburn* concerned impeachment with an uncounseled conviction, as opposed to enhancement. Imprisonment in the enhancement situation is a more direct result of the prior uncounseled conviction than in the impeachment context, for the role the impeachment played in the conviction may be speculative. (Pet. Br.19, n.11)

Texas, 389 U.S. 109, 88 S.Ct. 258, 18 L.Ed.2d 319 (1967), and *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). In *Burgett*, the prior uncounseled conviction was held inadmissible for purposes of enhancement, even though the defendant had never sought by collateral remedies to have his prior conviction reversed. In this sense his prior conviction was not void, but voidable or capable of being invalidated upon the defendant's objection to its use. Similarly, in *Loper v. Beto*, 405 U.S. 473 (1972), where the Supreme Court prohibited the use of a prior uncounseled conviction for purposes of impeaching the defendant, there had been no affirmative steps taken to overturn the prior conviction. In both of these cases, then, facially valid convictions existed, but were not valid for subsequent use because they were in violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1961).

Admittedly this is where the analogy falls short in petitioner's case, since his prior misdemeanor conviction is valid for purposes of a fine under *Scott v. Illinois*. However, when the prosecutor seeks to use it for enhancement it suffers from the same defect, lack of counsel, that existed in *Burgett*, *Loper*, and *Gideon*. The type of penalty imposed adds nothing to the degree of reliability of petitioner's prior conviction. What may be acceptable for purposes of imposing a fine is not sufficient to allow the more severe sanction of actual imprisonment. Unless a conviction evinces the necessary degree of reliability, it cannot be used to deprive liberty and be consistent with *Scott v. Illinois* and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). To demonstrate sufficient

trustworthiness in the fact-finding process to impose enhanced imprisonment, the prosecutor must first show that at the prior trial the person was either represented by counsel or made a knowing and intelligent waiver of counsel. As Justice Stewart wrote for the Court in *United States v. Tucker*, 404 U.S. 443, 447 n.5, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972):

> It is worth pointing out, however, that to make the contrary assumption, i.e., that the prosecution would have turned out exactly the same even if the respondent had had the assistance of counsel, would be to reject the reasoning upon which the *Gideon* decision was based . . .

In sum, then, petitioner's uncounseled misdemeanor conviction while valid for the purpose of a fine, is invalid for the purpose of imposing enhanced imprisonment.

The Respondent's analysis never addresses the question of whether a prior uncounseled conviction evinces the degree of reliability necessary to support the severe deprivation of liberty resulting in an additional two years of incarceration in the penitentiary and two years of parole. Instead, the Respondent first assumes that the validity of the prior misdemeanor is synonymous with its reliability for all purposes. (Resp. Br., 15-16) Second, the Respondent contends that petitioner has never argued that his prior uncounseled conviction was factually or legally incorrect.

Addressing the second argument first, it is simply not correct to say that petitioner has never challenged his prior misdemeanor conviction. Like petitioner Argersinger, we have consistently argued that because Baldasar was not afforded the right to counsel, he was unable to properly raise any defense he may have had

to the prior misdemeanor charge. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The presumption that petitioner's initial misdemeanor conviction is not sufficiently reliable to support enhancement of a subsequent sentence flows from the Sixth Amendment, which "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . .". *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972), relying upon *Johnson v. Zerbst*, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Chief Justice Burger agreed with the Court that those misdemeanor defendants unaided by counsel were no more able to defend themselves than those charged with serious crimes. Because of this, he felt that further attacks on such convictions would be fruitless:

> Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.

Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).[2] These holdings place the burden on the Respondent to show that petitioner was represented by counsel or that he intelligently waived counsel before his prior misdemeanor conviction may be used as

[2] One commentator agrees, concluding that if the defendant is forced to represent himself, the likelihood of review is small, if nonexistent. Furthermore, the author states that success on appeal often comes only as a result of the lawyer's presence at trial; otherwise no adequate record essential to appeal could be made. L. Herman, *The Right To Counsel In Misdemeanor Court*, 25-26 (1973) (hereinafter L. Herman.)

a basis for enhancing a second sentence which actually results in imprisonment.[3]

A valid conviction is not synonymous with its reliability for all purposes. Because uncounseled defendants often do not have the legal skill to defend themselves, there is an unacceptable risk that arises when such convictions are used to enhance the sentences of subsequent convictions. The risk is that a prior conviction of an innocent person may result in a substantial deprivation of liberty.[4] In *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), this Court reversed misdemeanor convictions for loitering and disorderly conduct on the due process ground that the convictions were unsupported by any evidence. Presumably a similar situation could arise and go undetected in a case involving a misdemeanor defendant without counsel who is punished by

[3] No remedy was available for petitioner to attack his May, 1975 uncounseled misdemeanor conviction when he was tried in August, 1976. (App. 20) His time for filing a direct appeal had expired. *Ill. Rev. Stat.*, Ch. 110A, §606(b). His time for filing a post-conviction challenge to the conviction had also expired after six months. *People v. Warr*, 54 Ill. 2d 487, 298 N.E.2d 164 (1963). Since petitioner was not in custody a petition for a writ of habeas corpus in federal court could not be filed. 28 U.S.C. §2254.

[4] L. Herman, *supra*, at 27 claims that every student of the misdemeanor process has observed that the risk of convicting an innocent person in misdemeanor court is much higher than in felony court, citing as examples statement of Prof. D. H. Oaks, in *Mass Production Justice And The Constitutional Ideal*, 97-98 (Whitebread ed. 1970); W. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 Legal Aid Brief Case 151, 152 (1970).

only a fine.[5] Under the Respondent's theory such a conviction could be used to enhance a subsequent sentence, as could a conviction upon which a fine was imposed, even though the circumstances described by Justice Stewart in his dissent from the denial of certiorari in *Winters v. Beck*, 385 U.S. 907, 907-908, 87 S.Ct. 207, 17 L.Ed.2d 137 (1966), were present:

> . . . The judge did not advise him of the nature of the charges against him, of the possible penalty, or of his right to make objections, cross-examine witnesses, present witnesses in his own behalf, or to have a trial *de novo* in the county circuit court under Ark.Stat.Ann. §§44-115, 44-509 (1964 Repl.Vol.) Not surprisingly, the petitioner did not object to the evidence offered by the prosecution, did not cross-examine the prosecution witnesses, did not exercise his right to a trial *de novo* in the county circuit court. Also not surprisingly, the petitioner did not question the vagueness of the charge against him [immorality] nor the validity

[5] It would probably occur more frequently that a defendant would be convicted where the evidence would be insufficient to meet the constitutional standard of proof beyond a reasonable doubt as opposed to situations where the conviction did not meet the no evidence standard of *Thompson v. Louisville. Cf. Jackson v. Virginia*, ____ U.S. ____, 61 L. Ed. 2d 560 (1979). The appellate branch of the Legal Aid Society of New York wins approximately 40 percent of its appeals from misdemeanor convictions. In 16 percent of its appeals convictions were reversed on the ground of insufficient evidence. Brief for the Legal Aid Society of New York as Amicus Curiae, pp. 17-18, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

> of converting a sentence of 30 days into one of 9½ months solely because of his poverty.[6]

What this Court must decide is whether misdemeanors that are indistinguishable from those described above (except for the fact that liberty was not deprived) may be used as a basis to enhance a subsequent sentence that results in incarceration. When a defendant is tried without counsel he is placed in a position of prejudice. This Court in *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972), referred to one study that concluded that misdemeanants represented by counsel are five times as

[6] A public defender from Philadelphia has observed what may happen when a court advises a *pro se* defendant his right to cross-examination:

> I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness. Not infrequently, this violation of the rules of trial procedure brings forth a sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.

Pollock, *Equal Justice in Practice*, 45 Minn. L. Rev. 737, 741-742 (1961).

likely to emerge from court with all charges dismissed as those who face similar charges without counsel.[7]

B. Prohibiting Enhancement Of Imprisonment On The Basis Of Uncounseled Misdemeanor Convictions Will Not Cause Confusion In Administering The Criminal Justice System Nor Result In Substantial Costs To The States

The respondent ignores the risks inherent in uncounseled convictions and instead argues that the preclusion of using an uncounseled conviction for enhancement will result in substantial costs and confusion and undercut the holdings of *Scott* and *Argersinger.* (Resp.

[7] Other studies have reached similar results:

> In March, 1965, 1,590 persons were arraigned in New York City's misdemeanor court on disorderly conduct charges. 1,259 pleaded guilty, 325 were acquitted, and six were convicted after trial. In March, 1966, after Legal Aid representation was introduced into the court, 1,326 were arraigned, 45 pleaded guilty, one was convicted after trial, and 1,280 were acquitted.

Botein, N.Y. Governor's Conference on Crime 149 (1966), quoted in P. Wald, *Poverty and Criminal Justice,* Appendix C to The President's Commission On Law Enforcement and Administration Of Justice, Task Force Report: The Courts 141, n. 16 and L. Herman *supra* p. 27. *See, too,* Herman's own study of the Columbus, Ohio Municipal Court, where in a month dismissals occurred in 63 percent of the cases where the defendants had counsel as opposed to 17 percent where they were not represented.

Br., 10, 14)[8] The Respondent's concession referred to at pages one and two of this brief, which was made in *Scott v. Illinois,* is a recognition that petitioner Baldasar is not asking this Court to in effect overrule *Scott.* Petitioner is not asking this Court to hold that a defendant be represented in *all* misdemeanor prosecutions. Nor is it suggested that this Court require the appointment of counsel in *any* misdemeanor trial where imprisonment is not imposed as a punishment. Instead the petitioner seeks a rule that would preclude the prosecution from elevating misdemeanors to felonies and from enhancing sentences upon fine-only uncounseled misdemeanor convictions. Therefore, any state still has the option of not providing counsel when faced with a theft prosecution such as petitioner's first misdemeanor charge, which involved the theft of three packages of bacon.

[8] The Amicus makes an identical argument claiming that the decision in this case will directly affect felony prosecutions for repeat offenders under 8 U.S.C. §1325. (Amicus Br., 2, 5-8) The Amicus states that there are more than 13,000 petty offense cases disposed of under this section a year. That figure is misleading because it does not indicate how many of these prosecutions involved repeat offenders. Nor does the figure indicate how many of the 13,000 defendants had counsel, waived counsel, or were indigent. Moreover the claim that 500 prosecutions concerning subsequent illegal entries by aliens involve many cases where the defendants were not represented by counsel at the time of their first conviction is also misleading since the Amicus cannot say how many cases this involves. The matters are outside the record and are provided by an unnamed, unpublished INS source. The estimate of 500 felony prosecutions each year under §1325 is incorrect. The United States District Court Sentences Imposed Chart for the 12 month period ending June 30, 1978, and published by the Administrative Office of the United States Courts page seven indicates that 198 defendants were sentenced for a felony offense §1325 in district court.

The cost to the Respondent, if any, arises in the event that the prosecution requests that counsel be appointed in order to preserve its option to enhance petitioner's sentence at a later date. However, the majority of misdemeanor offenses are not tied to any enhancement provision. Thus, the problem in the instant case is minute in scope compared with that posed by *Scott v. Illinois*, where, had petitioner prevailed, counsel would be provided in every misdemeanor where imprisonment was an authorized punishment. In many enhancement situations the Respondent may already provide counsel, since serious offenses may be at issue and the prosecution is seeking imprisonment upon the first violation of the particular misdemeanor offense. The Respondent's and the Amicus' assertion that the implementation of the requested rule would result in substantial cost is not supported by any data, nor is the cost estimated. Petitioner asks this Court to reject the arguments in part because they are factually incorrect, but "in much larger part because of the Court's conclusion that incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." *Scott v. Illinois*, 59 L.Ed.2d 383, 388-389 (1979).[9]

[9]The "substantial cost" argument was accepted by the majority panel in *Scott v. Illinois*, 59 L.Ed.2d at 389. However, the minority of the Court rejected this argument as irrelevant and speculative. 59 L.Ed.2d at 396 (Brennan, J., concurring). *See too* L. Herman and Thompson, *Scott v. Illinois*, and the Right to Counsel: A Decision in Search of a Doctrine? 17 Am. Crim. L. Rev. 71 (1979). In view of the fact that imprisonment is at issue here the argument concerning cost may be found to be irrelevant.

That confusion and expense will not arise from the rule petitioner urges is demonstrated partially from the majority of jurisdictions that have adopted the rule. (Pet. Br., 18-24) In those states prosecutors and trial courts know that, absent a knowing and intelligent waiver, no enhancement will be allowed from an uncounseled misdemeanor. If neither the history of the defendant, nor the seriousness of the charge indicates that jail is a likely sentence, it is also unlikely that the need for enhancement will arise. Conversely, if a pattern of criminal conduct appears to be developing, certainly the prosecutor could ask that counsel be appointed, and keep the option of enhancement at a later date open. This solution was so obvious that the Respondent previously admitted in *Scott v. Illinois* that it would be precluded from enhancement of subsequent offenses if it did not initially provide counsel for the defendant. It found this acceptable as falling within the proper scope of prosecutorial discretion. (Brief of Resp. 19-20, *Scott v. Illinois*, 59 L.Ed.2d 282 (1979).[10]

The Respondent and the Amicus find it significant that petitioner's sentence was for his second conviction and not an additional or delayed punishment for the original offense. (Resp. Br., 15) (Amicus Br. 9) However, it cannot be denied that the judgment and conviction obtained in the first trial was a necessary element of proof to justify subsequent imprisonment.

[10]One reason this decision rests more with the prosecutor than with the trial court is that "[i]n a nonjury case the prior record of the accused should not be made known to the trier of fact except by the way of traditional impeachment." *Argersinger v. Hamlin*, 407 U.S. 25, 42 (1972) (C. J. Burger, concurring).

People v. Ramey, 22 Ill.App.3d 916, 317 N.E.2d 143 (2nd Dist., 1974). Without the conviction petitioner could not have had his maximum sentence increased by two years, nor an automatic two-year parole term added, nor a misdemeanor elevated to a felony so that the place of incarceration would be in a penitentiary. The Respondent and Amicus argue that the heavier punishment was for the second offense, but this begs the question of whether the first conviction is reliable enough to warrant an additional two years' deprivation of liberty for a second offense. The consequence in petitioner's situation, whether referred to as a direct result or a collateral consequence, should not be allowed unless the petitioner was represented by or waived counsel at his original trial.

The Amicus presumes that if petitioner prevailed this Court's decision would be retroactive, thus having a confusing and costly effect which would include an extensive upsetting of final judgments through collateral attack. (Amicus Br. 8) In presuming retroactivity, the Amicus implicity admits that this case falls within the category succinctly explained by Mr. Justice White, speaking for a plurality of the Court:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given retroactive effect . . . Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). Since the absence of counsel at petitioner's first trial was directly connected with the truth-determining process, the cost and confusion argument made by the government should be given little weight. Of course, the question of retroactivity posed by the Amicus is simply not before the Court in this case.[11]

C. Contrary To The Amicus' Suggestion, This Is Not A Case Concerning A Status-Type Offense, Nor Has A Double Jeopardy Argument Or Substantive Due Process Argument Been Made By The Petitioner

There is no dispute that petitioner's enhanced sentence was for his second conviction. Contrary to the Amicus' assertion, petitioner has never argued that this is a Double Jeopardy case. (Amicus Br. 9) What the Amicus ignores is that it is impossible to deny that "but for" the earlier conviction, the petitioner would not have had his liberty deprived for an additional two

[11] In this section the Amicus misstates the petitioner's position in footnote 9 of its brief at page 8. Petitioner does not reject the dissent below which was of the opinion that imprisonment directly results from the enhanced punishment situation and that the connection is more remote for impeachment. (App. A-29) (Pet. Br. 19-20, n. 11) What petitioner argued was that if this Court reaches the question of impeachment the better result would be to preclude impeachment by a prior uncounseled conviction even if the actual deprivation of liberty is not as direct a consequence as the instant situation.

years. Such a use of an uncounseled misdemeanor conviction makes the accused suffer "anew" from the fact that counsel was not present. *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

The Amicus relies on *Mays v. Harris*, 523 F.2d 1258 (4th Cir., 1975), in arguing that enhanced punishment statutes are properly analyzed as defining status offenses. (Amicus Br. 10) *Mays v. Harris* is not persuasive authority for this proposition and may have been decided improperly. Mays had been convicted of operating a motor vehicle while classified as a habitual offender. The district court granted Mays' habeas corpus petition because it found that two of the four convictions underlying Mays' habitual offender status were invalid under *Argersinger v. Hamlin*, 407 U.S. 25 (1972), since Mays had been imprisoned without counsel. *Mays v. Harris*, 369 F.Supp. 1348 (W.D.Va. 1973). The Fourth Circuit reversed, finding that the sentence Mays complained about did not depend upon the validity of his underlying convictions:

> Mays was convicted and sentenced, therefore, not because he was an adjudged habitual offender, but because he wilfully and flagrantly violated an extant court order [not to operate a motor vehicle].

Mays v. Harris, 523 F.2d 1258, 1259 (4th Cir., 1975). In an analogy to contempt proceedings the court found that Mays' present conviction did not flow directly from the earlier adjudication, since an essential new element was that Mays drove a motor vehicle in the face of an order forbidding it. No similar order appears in the instant case, nor does the Illinois theft statute that petitioner Baldasar was initially convicted of confer a status upon him. (*Ill.Rev.Stat.*, 1975, Ch. 38, §1005-8-3(a)(1) Pet. Br. 3). Thus, the contempt analogy must fail and the conclusion remains that the enhanced penalty flows directly from the prior misdemeanor conviction.

Besides being distinguishable, the holding of *Mays v. Harris* may be incorrect since the option gives no indication that it ever considered the implications of *Burgett v. Texas*, 389 U.S. 109 (1967). It would seem inescapable that in part, the prior uncounseled offenses of Mays supported the determination of guilt for his later offense in violation of *Burgett*. For this approach see *City of Monroe v. Fincher*, 305 So.2d 108, 110 (La., 1974) explained at page 18 of petitioner's brief.

Next, the Amicus refers to the fact that 18 U.S.C. App. 1202(a)(3) prohibits the possession of a firearm by any person who has been adjudged a mental incompetent. It argues that it is proper to base the conviction on the prior civil commitment proceedings even though the standard of proof is lower than that in a criminal trial. While that statement is correct, the Amicus fails to note that the subject of an involuntary commitment would be constitutionally entitled to counsel. *Heryford v. Parker*, 396 F.2d 393 (10th Cir., 1968). Therefore the truth-finding process would not be affected to the degree it would where counsel is absent. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Trials*, 70 Harv.L.Rev. 1, 8 (1956).

The Amicus' argument that the original misdemeanor conviction is at least as reliable in showing petitioner's need for enhanced punishment as is information routinely considered in pre-sentence reports is highly

questionable in view of *United States v. Tucker*, 404 U.S. 443 (1972). The Amicus fails to state why an uncounseled misdemeanor conviction is any different from an uncounseled felony conviction other than to cite the misdemeanor's validity for purpose of a fine only. The sentencing analogy also fails because the prior misdemeanor is an essential element of the subsequent offense, and upon proof beyond a reasonable doubt of that element an entirely different and more severe range of sentencing options come into existence. For example, without the prior misdemeanor conviction petitioner could have at the worst been sentenced to less than one year, but upon proof of the prior conviction under the enhancement provision, the maximum sentence could be three years, which petitioner received. (Compare *Ill.Rev.Stat.*, 1975, Ch. 38, §1005-8-3(a)(1) with §1005-8-1(b)(5) and (c)(5).) The trial court could have placed petitioner on probation for the second, enhanced offense; however, if it chose to imprison petitioner, it could not do so for less than a one-year period. *Ill.Rev.Stat.*, 1975, Ch. 38, §1005-5-3(d)(1). No similar consequence could flow from a court's reliance upon such material at a subsequent sentencing hearing where enhancement was unavailable. While the Amicus suggests that severe consequences do not alone require the appointment of counsel, the Sixth Amendment prohibits such a severe loss of liberty as this without the right to counsel.

The Amicus incorrectly frames the question in this case as being whether the legislative decision to treat those previously convicted of a misdemeanor more stringently than first offenders is arbitrary when the defendant was not represented by counsel at the first

trial. (Amicus Br. 10) The petitioner has never made such a substantive due process argument that the legislature's enhancement scheme was arbitrary. Petitioner does not question the essence of the enhancement statute as being contrary to substantive due process. Rather, if this case is viewed in terms of a due process question, it should be viewed as a question of procedural due process rather than substantive due process as the Amicus would have it. This is, the petitioner's procedural due process rights under the Sixth and Fourteenth Amendments were violated by the manner in which his case fell within the enhancement statute. Even if the statute is sound in its end, the procedures leading to its application must conform to due process protections. Here they did not. Petitioner's procedural due process rights were violated when a previous uncounseled misdemeanor conviction was used to place him within the purview of the statute. His due process rights were violated in that additional imprisonment was imposed under the statute as a direct result of an uncounseled misdemeanor conviction. Petitioner's claims may succeed where petitioner Scott's failed since the consequence in *Scott v. Illinois* was a fine, whereas here the consequence is actual imprisonment in violation of *Argersinger v. Hamlin*.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

MARY ROBINSON
Deputy Defender
Office of the State
Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State
Appellate Defender
First Judicial District
130 North Wells Street
Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH REUBNER
Deputy Defender
Office of the State Appellate Defender
130 North Wells Street
Suite 2200
Chicago, Illinois 60606

PETER B. NOLTE
Suite 503
Rock River Savings Building
Rockford, Illinois 61101